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No. 92-008

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1991

BODINE'S, INC.,

Petitioner,

v.

PAT GORDON, CATHERINE THOMAS, SAM GORDON, MICHELLE CHROMAN, ADAM CHROMAN, MELISSA CHROMAN; EDWARD BODEN, SR. and EDWARD BODEN, JR.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT, FIRST JUDICIAL DISTRICT

RESPONDENTS' OBJECTIONS TO MOTION FOR LEAVE TO FILE AMICUS BRIEF

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To the Chief Justice and Associate Justices of the Supreme Court of the United States

Respondents Pat Gordon, Catherine Thomas, Sam Gordon, Michelle Chroman, Adam Chroman, and Melissa Chromas respectfully object to the motion of the Mid-America Legal Foundation et al. for leave to file brief *amicus curiae.*

The "motion" and proposed amicus brief do not comply with Rule 37 of this Court. They do not "bring[ ] relevant matter to the attention of the Court that has not already been brought to its attention by the parties."

Examination of the "amicus" brief discloses that it is nothing more than an outrageous attempt to place before the Court "facts" which are unsupported by anything in the record and are incorrect. In many instances, the record is affirmatively misrepresented.

To illustrate:

1. Page 2 of the "motion" states that "[t]he defendants in this case sold an orange juice blend which was mislabeled as 100% pure orange juice. Plaintiffs seek to punish the defendant for that misrepresentation, as the juice contained some additional ingredients." Nothing in the record is cited in support of this statement.

In fact, plaintiffs allege that Bodine's, Inc. put evaporator waste water, monosodium glutamate, and other low-cost ingredients in its "orange juice." (Cmplt., ¶¶ 26, 39) "Orange drink" is a product defined by the FDA; we are not aware of *any* product that is permitted to have the "ingredients" that Bodine's, Inc. put in its "product." Certainly, the authors of the "amicus" brief cite nothing to support the proposition that it is permissible to sell what Bodine's, Inc. is alleged in the complaint to have sold.

2. Page 2 of the motion further states that "Plaintiffs have no plausible plan to reimburse or even identify" the class members. No support for this statement is cited and none exists.

3. Page 2 of the motion asserts that "named plaintiffs suffered somewhere between about 30¢ and $2 each in damages during the mid-1980s." This statement is not true. No support for the statement is cited and none exists in the record.

4. Page 2 of the motion states that "Plaintiffs do not intend to notify [class members] of this action either by mail or by publication." This is incorrect.

5. Page 2 of the motion asserts that "members of the class are not expected to make individual claims or receive compensation." This is incorrect. Plaintiffs have consistently maintained that class members must be given an opportunity to file claims.

6. Page 3 of the motion states that "Plaintiffs plan to figure damages based on the manufacturing costs of an orange juice drink as compared with 100% juice." Nothing is cited for this proposition. It is incorrect.

7. On page 2 of the "amicus" brief, the authors state:

> In 1985, Bodine's Inc. was sold. The buyers knew nothing of the company's past deeds. The new owners have always produced pure juice products, all accurately labelled.

Nothing is cited in support of this statement. Nothing exists. The knowledge of the buyers is a question of fact that has not been resolved. Furthermore, litigation is pending in which the new buyers are attempting to transfer the juice business back to the former owners. The juice production of Bodine's, Inc. after 1985 is not in issue; it is certainly inappropriate to state as a "fact" that they have accurately labelled everything.

8. On page 2 of the "amicus" brief, the authors state that plaintiffs "seek the difference between the 100%

pure juice they paid for and the orange drink mixture they received." This is another fabrication. Plaintiffs do not contend that they purchased "orange drink mixture." They contend that they purchased worthless, adulterated, garbage.

9. On page 2 of the "amicus" brief, the authors state that under "fluid recovery" plaintiffs can "proceed with the lawsuit without notifying any other class members."

Nothing is cited in support of this statement. Nothing exists. Plaintiffs have not addressed the appropriate form of notice because proceedings in the trial court have been stayed pending resolution of the instant appeal. At no time have plaintiffs addressed the need for notice, much less disclaimed it. The authors of the "amicus" brief are simply attempting to mislead the court.

10. On page 3, the "amicus" states that any amounts not paid to the named plaintiffs "will not be transferred to members of the class. Instead, it is earmarked for some project considered beneficial to orange juice consumers in general . . . ."

This is another misstatement of the record and of plaintiffs' position. The trial court's order found that *many* of the class members would not be able to prove their purchases through documentary evidence. However, *some* can – several of the named plaintiffs still have coupons, labels and Uniform Product Codes (the bar code found on most grocery packages), which they collected in connection with promotional offers. Plaintiffs stated in their Illinois Appellate Court brief:

> Once the gross damages are computed, class members can file proofs of claim setting forth their purchases of the affected orange juice products and providing any documentation of the purchases that

> was retained (such as several of the named plaintiffs kept). If the claims do not exhaust the total recovery, the balance can be placed in a fund for the purpose of reducing the prices on the affected orange juice products. (Brief of Plaintiffs-Appellees, p. 7)

11. On page 6, the authors of the "amicus" brief state that the trial court "summarily found that the named plaintiffs adequately represent the class . . . ." The trial court did not "summarily" find anything. The class issue was extensively briefed; all the plaintiffs were deposed.

12. At page 7, the authors of the "amicus" brief state that "Named plaintiffs . . . are merely ornamental, enabling their attorneys to bring the lawsuit." The fact is that most of the named plaintiffs joined this lawsuit after it was filed, upon reading about it in the press, because they felt that they had been imposed upon. The addition of the plaintiffs is in the record. They testified to their reasons for joining the action in their depositions.

13. At page 8 of the "amicus" brief, the authors state that there can be no assurance that any reduction of orange juice prices will be borne by Bodine's, Inc. As usual, nothing is cited in support.

It is possible to insure that Bodine's, Inc. will bear the burden of a price reduction by using coupons. The "amici" are undoubtedly aware of this.

14. On page 9 of their brief, the "amici" state that "significant defense costs as a result of this very lawsuit" must be passed on to consumers through a price increase. This is another inaccurate statement. Bodine's ability to raise prices is constrained by competition.

15. On page 9, the "amici" state that the "unclaimed portion of the damage fund" will be "about 99 percent

of it." No basis for this figure is stated. None exists. It is a pure fabrication or speculation.

16. On page 11, the "amici" state that it will cost "$50 to recover 50 cents." Again, no basis for this figure is stated. None exists.

17. On page 12 of their filing, the "amici" state that "Plaintiffs admit . . . the total money damages being sought are not based on compensation proportionate to plaintiffs' injuries. These plaintiffs are asking for blood." Most of the quoted statement is italicized.

Again, the "position" attributed to plaintiffs is a complete fabrication. Plaintiffs' Appellate Court brief explained (p. 4) at length how "it is possible to determine how much defendants made through their illegal activities, or how much they saved by comparing the cost of the adulterated materials to the cost of the ingredients of orange juice."

18. The decision in *Cicielski v. Sears, Roebuck & Co.*, 132 Mich.App. 298, 348 N.W.2d 685 (1984), did *not* hold what the "amicus" claims. The "findings" that the "amicus" refers to were findings of the Michigan trial court, which rejected fluid recovery. The appellate court in *Cicielski* rejected the position of the trial court, and held that fluid recovery was not impermissible. However, based on grounds *other* than those relied upon by the trial court, it determined that fluid recovery was not necessary or appropriate in the particular case. The reason was that the defendants had relied on official interpretations which allowed their methods of interest calculation.

* * *

The "amicus" motion and brief are disrespectful to the Court. They do not seek to place before the Court anything that belongs in an *amicus* brief. They seek to misstate the record in this case. The parties are quite capable of advising the Court of the contents of the record in this case. If Petitioner are not willing to make the statements set forth in the "amicus" papers, because they are false and sanctionable, such statements should not be placed before the Court through a surrogate.

The *only* statement in the "amicus" papers that is at all "relevant" is the statement on p. 3 that *amici* are concerned that the opinion of the Illinois Appellate Court "will completely reverse settled class action law in Illinois . . . ." This statement explains in a nutshell why this Court should *not* grant review in this matter. Illinois can shape its law as it sees fit, as long as it complies with federal constitutional requirements.

As set forth in our opposition to the petition for certiorari, no significant federal constitutional issue is presented in this matter.

CONCLUSION

The "amicus" motion and brief are wholly inappropriate. Leave to file should be denied.

Respectfully submitted,

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September 25, 1992

CERTIFICATE OF SERVICE

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